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# Recent Cases

# RECENT CASES

## OPERATIVE OFFERS IN CIRCULAR LETTERS

The recent holding of the Pennsylvania Supreme Court in *Jenkins Towel Service, Inc. v. Fidelity-Philadelphia Trust Co.*[1] is particularly illustrative of the need for careful and precise draftsmanship in the composition of circular letters and other customary proposals employed by businessmen in their solicitations. Often, in an attempt to make their propositions attractive, they inadvertently subject themselves to contractual liability as did the drafters in the instant case.

Here, defendants, acting within their capacity as fiduciaries, mailed letters to several prospective purchasers of trust realty. Plaintiffs were the recipients of one such letter. Among other things, the letter stipulated that offers or bids must be in excess of 92,000 dollars, a check in the amount of 10 percent of the bid must be forwarded, offers would be on an all cash basis, an agreement of sale would be tendered to the "highest acceptable bidder," and all offers were subject to the approval of the trustees. In addition, the right to withdraw the properties from the market was retained.[2]

This letter produced two responses, one from plaintiff and one from the Esso Standard Oil Company. Both bids were in the same amount; however, plaintiff's was in precise compliance with the provisions contained in Fidelity's letter while Esso's bid was conditional. This action was commenced to prevent defendant's acceptance of Esso's offer and to obtain specific performance of an alleged contract to sell the realty in question to plaintiff.

The case reached the supreme court on appeal by the plaintiff from an adverse ruling in the court of common pleas. By a majority decision the court reversed the holding of the lower court, basing its decision upon a finding that Fidelity's letter constituted not preliminary negotiations, but an operative offer which created a power of acceptance in the highest bidder complying with the instructions contained therein. Since plaintiff's bid had been unconditional and in compliance with the letter, it was held to be a valid acceptance of Fidelity's offer.

The single controlling issue to be determined in the *Jenkins* case was whether the circular letter constituted an offer or mere preliminary negotiations. In light of prior holdings it is difficult to rationalize the holding in

1. 161 A.2d 334 (Pa. 1960).
2. 161 A.2d at 335.

this case. A review of established legal principles will illustrate this conclusion.

The difference in effect between offers and preliminary negotiations is elementary.[3] An offer creates a power of acceptance which, upon execution, gives rise to present contractual relations. Preliminary negotiations, on the other hand, carry with them no such power of acceptance from which contractual obligations may arise. However, the line of demarcation between offers and preliminary negotiations is not amenable to precise delineation; courts have established certain criteria to guide them in their decisions. An examination of these criteria must be made in order that the holding in the *Jenkins* case may be fairly examined.

It is a well settled principle of law in Pennsylvania that the court must, when construing a communication, ascertain the intention of the party who has made the alleged offer.[4] This fact gives rise to the operation of various rules of contract interpretation. In that the "objective theory" of contract interpretation prevails today, these rules must be employed so as to determine the actual manifested intent of the party. Since there must exist at the time of the offer a present contractual intent, the primary consideration must be whether or not the words used by the purported offeror were conditioned in any way, express or implied, so as to preclude the finding of the requisite manifestation of present contractual intent.[5] The *Restatement of Contracts* provides that:

> If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.[6]

An express reservation of the right to reject any bids was held to be controlling in one Pennsylvania case and was conclusive in another. In *Straw v. Williamsport,*[7] the city, in advertising for bids, included in the advertisement the provision that the "council . . . reserves the right to reject any or

3. See generally Upsal Street Realty Co. v. Rubin, 326 Pa. 327, 192 Atl. 481 (1937); Cohen v. Johnson, 91 F. Supp. 231 (M.D. Pa. 1950); 1 WILLISTON, CONTRACTS § 25 (3d ed. 1957); 1 CORBIN, CONTRACTS § 25 (1950); RESTATEMENT, CONTRACTS § 25 (1932); Vitro Mfg. Co. v. Standard Chemical Co., 291 Pa. 85, 139 Atl. 615 (1927); Edgcomb v. Clough, 275 Pa. 90, 118 Atl. 610 (1922); Berkowitz v. Kass, 351 Pa. 263, 40 A.2d 691 (1945).

4. Windsor Mfg. Co. v. Makransky, 322 Pa. 466, 186 Atl. 84 (1936); Cohen v. Johnson, 91 F. Supp. 231 (M.D. Pa. 1950).

5. Fogel Refrigerator Co. v. Oteri, 391 Pa. 88, 137 A.2d 255 (1957) *aff'd mem.*, 10 Pa. D. & C.2d 511.

6. RESTATEMENT, CONTRACTS § 25 (1932).

7. 286 Pa. 41, 132 Atl. 804 (1926).

all bids or any part of any bid."[8] In holding that the advertisement did not create a power of acceptance, the supreme court said: "The advertisement reserved the right to reject any or all bids or parts of bids, and *that is conclusive* of the question."[9] (Emphasis added.) A similar situation existed in the case of *Hilliard Estate*.[10] Here a corporate fiduciary mailed advertisements to several prospective purchasers stating an asking price and stipulating that all offers were to be held subject to the approval of the co-executors. Again the court held there had been no offer:

> The circular letter, however, unequivocally stipulated that all offers were subject to the approval of the co-executors, and that no broker would be recognized unless offers submitted were acceptable to the co-executors and a satisfactory agreement of sale executed. Therefore, the circular letter merely constituted an invitation to bid.[11]

On the basis of the foregoing decisions it would be safe to say that one important measure employed by the courts in determining whether a given communication is an offer or preliminary negotiations is the presence or absence of express reservations in the document in dispute.

In the absence of any express reservations or limitations, the problem remains whether or not there may be implied reservations which would militate against the finding of present contractual intent. This is the area which presents the greatest difficulty. Some of the circumstances that the courts will consider are the actual words used by the parties, general business practices, the monetary amount involved, and the capacity in which the parties are negotiating. These various factors merit further consideration as they were all present under the facts in the *Jenkins* case.

In ascertaining the actual intent of the alleged offeror as manifested to the alleged offeree, the words chosen should be examined with care since the law will not presume that words are chosen carelessly.[12] It must be assumed that businessmen, by virtue of daily encounters with the law of contracts, are aware of the difference between the making of an offer and the asking for a bid. The dissent in the *Jenkins* case is consistent with this proposition.[13]

Not only must the choice of words be examined, but these words must be given their ordinary meaning.[14] If this maxim be applied when interpret-

8. *Id.* at 42, 132 Atl. at 805.
9. *Id.* at 43, 132 Atl. at 805.
10. 383 Pa. 63, 117 A.2d 728 (1955).
11. *Id.* at 66, 117 A.2d at 730.
12. See, *e.g.*, Daniels v. Bethlehem Mines Corp., 391 Pa. 195, 137 A.2d 304 (1958).
13. 161 A.2d at 339.
14. See, *e.g.*, Pines Plaza Bowling, Inc. v. Rossview, 394 Pa. 124, 145 A.2d 672 (1958).

ing an alleged offer, it can readily be seen that the choice of words may be instrumental in discovering the existence or non-existence of any implied reservations.

If, however, it is impossible to determine the intention of its author from the face of the writing, the court must look to other surrounding circumstances in its endeavor to ascertain the true import of the language used. "The determination of whether a certain communication by one party to another is an operative offer, and not merely an inoperative step in the preliminary negotiations, is a matter of interpretation in light of all the surrounding circumstances."[15] It is in this connection that the other circumstances mentioned above become significant.

General business practices may aid the court in its search for the existence of the requisite intent. The question here is whether businessmen in similar circumstances would or would not make an offer. A recent case in the United States District Court dealt with an alleged offer for the sale of coal over a relatively long duration.[16] In dealing with the problem the court decided that no offer had been proposed, stressing the fact that contracts for such a duration were uncommon in that particular industry.

Another circumstance that has been considered under the general heading of business practices is the place at which the alleged offer was made. In *Brown v. Finney*[17] plaintiff contended that defendant had made an offer for the sale and delivery of a substantial quantity of coal. The alleged offer was made in a saloon where the two men had accidentally met. Acknowledging the fact that it is extremely difficult to determine whether or not an offer has been made, the court intimated the unlikelihood that a business transaction of such magnitude would be consummated under such circumstances.

The *Brown* case may also be taken to stand for the proposition that the amount of money involved in the transaction may shed some light on the party's actual intent. Although the court did not expressly set forth this postulate in so many words, it is reasonable to assume that the amount involved was one of the circumstances upon which the decision was founded. As a rule of thumb, it would be fair to say that as the amount involved increases, the possibility that an offer was made by circular letter decreases.

The capacity in which the alleged offeror is acting may be of aid in making the correct decision in a given case. It is a familiar principle of the law of trusts that a fiduciary is under a duty to exercise a high degree of care in relation to his dealings with trust property.[18] Where the purported offer stems from one acting in such a capacity, it is justifiable to presume that he intends

15. CORBIN, CONTRACTS § 22 (1950).
16. Cohen v. Johnson, 91 F. Supp. 231 (M.D. Pa. 1950).
17. 53 Pa. 373 (1866).
18. Herbert Estate, 356 Pa. 107, 51 A.2d 753 (1947).

to fulfill his legal obligation of care and has reserved for himself any and all safeguards possible. One such safeguard would be the right to reject any bids submitted to him pursuant to an advertising circular.

In the case of *Laskie v. Haseltine*,[19] plaintiff was attempting to establish acceptance of his bid by defendant. Plaintiff was the lowest bidder, and upon the opening of the bids the defendant had said, "you are the lucky man." In holding that there had been no acceptance, the court said:

> After the bids had been opened, it was the right of the defendant to inquire into the fitness and ability of the respective bidders to fulfill the contract. He was not bound to award it to a bidder who lacked either the skill, experience, or ability to properly perform the contract.[20]

This case stands to illustrate the point that courts have recognized by implication the right of businessmen to inquire into the capacity and capabilities of parties with whom they may become contractually involved. Where the relationship involves the sale by a trustee of trust property, general trust practice would demand such care. This care would only be possible through the retention of the ultimate right of approval or disapproval of one with whom business was to be conducted. If these factors are applied to cases involving the construction of an alleged offer, it would indicate that if the purported offeror is acting in a fiduciary capacity, it is doubtful that he meant to bind himself to an unkown or unascertained offeree.

Still another measure of the purpose of a writing, one which may be of aid to the court, is the definiteness and completeness of the alleged offer. The question here is whether or not all of the important terms are set forth in the writing. This consideration arises most frequently in cases involving alleged offers to make leases.[21] In *Upsal Street Realty Co. v. Rubin*,[22] the court was called upon once again to determine if an offer had or had not been made. The alleged offer was a writing which contained no mention of the method of payment of the rent, whether it was to be paid by month, week or year. It was held that no offer had been manifested due to the fact that terms that would ordinarily appear in an offer of this nature were absent. In addition to the specific language employed and the various factors to be taken into consideration under the surrounding circumstances, the rules used in construing written instruments may be of assistance to the court. Two such rules have previously been mentioned.[23] In addition to those, there is

19. 155 Pa. 98, 25 Atl. 886 (1893).
20. *Id.* at 100, 25 Atl. at 888.
21. See generally Upsal Street Realty Co. v. Rubin, 326 Pa. 327, 192 Atl. 481 (1937); Way v. Fraser, 230 Pa. 49, 79 Atl. 154 (1911).
22. 326 Pa. 327, 192 Atl. 481 (1937).
23. Daniels v. Bethlehem Mines Corp., *supra* note 12; Pines Plaza Bowling, Inc., *supra* note 14.

the rule that an ambiguous writing is to be construed against its author.[24] In addition it should be construed so as to give effect to all of its parts[25] without directly violating any provisions clearly expressed therein.[26]

The various circumstances, standards, and rules of interpretation set forth above have been used time and again by Pennsylvania courts in examining communications for the purpose of extracting therefrom the author's manifested intention. An application of these criteria to the specific fact situation that presented itself in the *Jenkins* case seems to indicate that the holding is not in concert with the proper utilization of these established criteria.

It has been shown that in at least one and possibly two cases the reservations of the right to reject any or all parts of bids was held to be conclusive of the determination between offer and preliminary negotiations.[27] An express reservation also played a significant part in the *Hilliard Estate* case.[28] The reservation made by Fidelity was as strong or stronger than those employed by the draftsmen of the aforementioned cases and yet very little weight was afforded it by the court. Upon the basis of the *Jenkins* holding, it would appear that any reservation of the right to approve or disapprove, however clearly stated, is no longer controlling or conclusive.

The concept of giving words their natural construction has been mentioned. Does not the use of the word "offer" and the word "bid" by an experienced business concern, given a natural construction and considered with the presumption that words are not chosen carelessly, lead one to believe that no present contractual intent was manifested? In what manner could the defendants in the *Jenkins* case have expressed themselves so as to forestall the conclusion that they were proposing an offer rather than merely soliciting bids? The majority in the *Jenkins* case gave no weight to the use of the terms "offer" and "bid."

That contracts are to be reasonably construed has been mentioned among the rules of interpretation. It must be remembered that Fidelity reserved in itself the right to approve or disapprove any and *all* offers and yet even this unequivocal provision was rendered ineffectual by the majority's interpretation. In reference thereto the court stated:

> We believe the sentence means that Fidelity can withdraw the

24. See, *e.g.*, Mowry v. McWherter, 365 Pa. 232, 74 A.2d 154 (1950); Acchione v. City of Philadelphia, 394 Pa. 622, 149 A.2d 125 (1959).

25. See, *e.g.*, Neal D. Ivey Co. v. Franklin Associates, 370 Pa. 225, 87 A.2d 236 (1952); Appeal of Powell, 385 Pa. 467, 123 A.2d 650 (1956); Cerco v. DeMarco, 391 Pa. 157, 137 A.2d 296 (1958).

26. See, *e.g.*, Commonwealth v. Nelson-Pedley Const. Co., 303 Pa. 174, 154 Atl. 383 (1931).

27. Straw v. Williamsport, *supra* note 7; Hilliard Estate, *supra* note 10.

28. 383 Pa. 63, 117 A.2d 728 (1955).

> properties from the market at any time before the opening of the sealed bids, and can approve or disapprove any offer which does not comply with all the conditions set forth by the Fidelity, or which complies but adds unsatisfactory terms.[29]

As to the right to disapprove or approve of any offers which do not comply with conditions set forth in the letter, this would be mere surplusage as Fidelity had already stated it would not even *consider* those offers not complying with the basic conditions.[30] In addition, Fidelity needed no "protection" against an acceptance coupled with unsatisfactory terms since such an acceptance would constitute a rejection of the offer and a counter-offer.

Moreover, the court ignored the rule of construction that provides that a contract should be construed so as not to directly violate something clearly expressed therein. *All* offers means each and every one, not only certain ones. This important word was, in effect, stricken from Fidelity's letter. Its importance was further exhibited by the addition of the clause reserving the right to withdraw the properties from the market. This would seem to eliminate any possibility that the purpose of "all" was to retain such right. The remaining alternative of the meaning of "all" was to amplify the word "any" so as to permit rejection of all offers not merely certain ones.

The holding in the *Jenkins* case does not, it is true, enunciate any new or revolutionary principles of contract law. However, it is significant by virtue of its omissions. The court did not avail itself of a number of important criteria mentioned above in arriving at its decision, choosing instead to elucidate on the rule that an ambiguous writing must be interpreted most strongly against its author.

It is fundamental that the law of contracts has, as one of its primary purposes, the task of imparting a degree of certainty into the everyday business transaction. Each individual decision by the courts has a dual function in keeping with this purpose. The first is to resolve the conflict between the parties before the tribunal; the second, and, it is submitted, more important, is to establish a guidepost for the use of lawyers in advising their clients.

What is the nature of the advice to be given in light of the holding in the *Jenkins* case? In soliciting bids for a particular piece of property there are two important considerations in the mind of the vendor. He desires to sell the property and, secondly, he desires to obtain the maximum number of bids possible in order to increase the price he will receive by virtue of competitive bidding. The letter of communication soliciting the bids must be such

29. 161 A.2d at 338.
30. 161 A.2d at 336.

as will provoke the most response and yet retain for its proponent some degree of control over the final award of the contract. This final goal can only be obtained by insuring that the letter will not be construed as an operative offer.

One thing is certain, there should never be contained in the given communication a naked statement to the effect that any of the bids will be accepted. This mistake was made by Fidelity when it stated that an agreement of sale would be awarded the highest acceptable bidder. A statement that the contract would be awarded to the bidder most acceptable to Fidelity regardless of the amount of the bid would possibly have resulted in a decision in Fidelity's favor. All statements pertaining to the award of the contract should be drafted so as to preclude the representation that any one bidder will prevail, either because of amount or any other thing.

Where the party soliciting the offer wishes to retain the right to reject any or all offers or to withdraw the property from the market at any time, he should say so unequivocally at both the beginning and at the end of the communication. He should also expressly state that this right to reject any or all bids or to withdraw the property from the market may be done before or after the submission of the bids and before or after the opening of the bids if they are sealed. The phrase "at any time" should not be used to convey this intention.

A final safeguard might be to include in the letter a statement to the effect that it is not to be construed nor is it intended to constitute an operative offer. This could be followed by specific mention of its intended character as preliminary negotiations.

In conclusion, the *Jenkins* case is a strong caveat that businessmen who draft letters seeking bids must take the utmost care so as to avoid ambiguities possibly resulting in unexpected contractual obligations.

ROBERT L. SCHUMANN

# THE HIGHLAND CASE: AN EXTENSION OF THE DUNHAM RULE TO GRANTS

The *Dunham Rule* is a rule of construction applied where there is an exception or reservation of minerals in a deed. Under this rule, a rebuttable presumption arises that oil and natural gas are not retained by the grantor by virtue of an exception or reservation unless specifically enumerated.[1] A recent Pennsylvania case, *Highland v. Commonwealth,*[2] has extended the *Dunham Rule* to grants, as well as to exceptions and reservations.

The rule arose in *Dunham v. Kirkpatrick,*[3] when the court was faced with the question of whether or not the following language was sufficient to reserve petroleum oil to the grantor: "Excepting and reserving all the timber suitable for sawing; also, all minerals; also the the right of way to take off such timber and minerals."[4] In answering in the negative, the court appears to have based its reasoning on the premise that to include petroleum oil within the term "minerals" would make the reservation all-inclusive, *i.e.,* a mineral would include any and all inorganic substances such as rock, sand, and clay, thus rendering the deed void for repugnancy in that the reservation would be as extensive as the grant.[5] Otherwise, an extensive grant would be limited to surface rights, a result which seems unintended considering the language used. The court further states that in a deed nothing which is not of a metallic nature should be included in the term minerals unless the parties manifest their intentions to the contrary. This stems from the rule that words are to be given their ordinary meaning; and, the court found that oil is not considered to be a mineral in the popular, as distinguished from the scientific, meaning of the word.[6]

In a subsequent case, the principles embraced by the rule were laid out more precisely.[7] Here, the court conceded that there are some instances where natural gas and oil have been considered to be minerals. It emphasized, "The crucial question . . . is what was the sense in which the parties used the word? . . . . It may in any particular case have a different meaning, more extensive or more restrictive, but such different meaning should clearly appear as intended by the parties."[8] Even with this clarification, the soundness of the rule seems to have been questioned.

In *Preston v. South Penn Oil Co.,*[9] the court appeared reluctant to follow

1. Dunham and Shortt v. Kirkpatrick, 101 Pa. 36 (1882).
2. 400 Pa. 261, 161 A.2d 390 (1960).
3. 101 Pa. 36 (1882).
4. Dunham v. Kirkpatrick, *supra* note 1, at 37.
5. *Id.* at 43.
6. *Id.* at 44.
7. Silver v. Bush, 213 Pa. 195, 62 Atl. 823 (1906).
8. *Id.* at 197, 62 Atl. at 833.
9. 238 Pa. 301, 86 Atl. 203 (1913).

the *Dunham Rule* but rationalized its decision by explaining that "*Dunham v. Kirkpatrick* has been the law of this state for 30 years and very many titles to land rest upon it. It has been a rule of property and will not be disturbed."[10] Thus, it appears that the court was constrained to follow the rule due to the bases of stare decisis and public policy.

Approximately forty years later, in the case of *Bundy v. Myers,*[11] the court held that a reservation of oil did not include the reservation of gas.[12] The language in the deed consisted of the following: "Excepting and reserving, out of this land, the oil, coal, fire clay and minerals of every kind and character . . . ."[13] The opinion concludes that since oil is not a mineral and must be specifically reserved, natural gas must likewise be specifically reserved.[14] This is the conclusion despite the fact that oil and gas are popularly understood as belonging to the same general inorganic classification. Hence, the court applied this rule so that any specification of nonmetallic mineral was deemed to evidence an intent to exclude other nonmetallic minerals.

The previously mentioned cases to which the *Dunham Rule* was applied dealt only with the problem of exceptions and reservations and appear to be directly in line with the case in which the rule was originally formulated. However, the *Highland* case is one of first impression in that it was the initial application of the rule to grants. The latter case involved a controversy over the rights to the natural gas deposits in and under four parcels of land. On June 25, 1900, I. F. Richey and others, trustees of the Caledonia Coal Company, conveyed to one N. T. Arnold the four parcels of land situated in Pennsylvania. At the end of the descriptive portion of this deed, appeared the following: "It is the intention of (Richey et al.) to convey . . . all the land, coal, coal oil, fire clay, *natural gas* and other minerals . . . ."[15] By this deed, it was conceded that title to the natural gas rights in the four parcels of land became vested in Arnold.

On the same date as that of the previously mentioned deed, Arnold, grantee in the above-mentioned deed, conveyed two of the parcels to one John Byrne. The latter was to receive: "All the coal, fire clay, limestone, iron-ore and other minerals in and under certain land . . . with the right and privilege of entering upon said land and taking away said *coal, fire clay, iron-ore, limestone and other minerals* hereby conveyed . . . ."[16] The two remaining parcels involved were conveyed by Arnold to one Hall and one Kaul on July 30, 1900. The essential provisions contained in this deed were that there

10. *Id.* at 304, 86 Atl. at 204.
11. 372 Pa. 583, 94 A.2d 724 (1953).
12. *Id.* at 588, 94 A.2d at 726.
13. *Id.* at 584, 94 A.2d at 725.
14. *Id.* at 587, 94 A.2d at 726.
15. Highland v. Commonwealth, 400 Pa. 261, 265, 161 A.2d 390, 393 (1960).
16. *Id.* at 266, 161 A.2d at 393.

was to be a conveyance of " 'all the coal, iron-ore, limestone, fire clay and other minerals' under a certain tract of land. 'All the Coal, Coal Oil, and other minerals of every kind and character' under another tract of land. . . ."[17] After the descriptive clauses in this deed, the following appeared: "Together with right and privilege of entering upon said lands and taking away said *coal, coal oil, fireclay and other minerals of every kind and character.*"[18] All the right, title, and interest conveyed in the Byrne and Hall-Kaul deeds by subsequent conveyances became vested in a group known as New Shawmut Mining Company which asserted title to the natural gas rights in the four parcels of land in the instant case.

The New Shawmut Company argued that the grantors in the Richey deed proceeded on the basis that natural gas was a mineral. Since the Byrne deed was executed on the same date as the Richey deed and the Hall-Kaul deed was executed only one month later, it should be presumed that the latter two deeds were executed on the exact same basis, *i.e.,* natural gas should be included within the term "minerals."[19] On the other hand, Arnold's representatives contended that the exclusion of "natural gas" from the detailed enumeration of minerals in the Byrne and Hall-Kaul deeds and its inclusion in the Richey deed indicate that the parties intended to exclude natural gas from the word "minerals" in the former deeds.[20] Additional contentions of the Arnold group were that the "rights-of-way" necessary for extracting natural gas were not conveyed in the Byrne and Hall-Kaul deeds. Further, by applying the rule of *ejusdem generis,* the only minerals that were conveyed by implication were *hard* minerals of the same type and character as those specifically enumerated.[21]

However, the court based its decision on the *Dunham Rule, i.e.,* the presumption that natural gas is not a mineral unless specifically enumerated. The court found that the presumption had not been rebutted. It also stated as a reason for the decision that the acquisition of natural gas rights was not the "principle objective" of the Byrne and Hall-Kaul deeds. The fact, that twenty-five years subsequent to the execution of these two deeds the land still had not been explored for natural gas deposits by the New Shawmut group or their predecessors in title, tends to substantiate this latter theory.

Another factor employed in arriving at the decision was the language used in the Richey deed and the Byrne and Hall-Kaul deeds. The court met the above-mentioned contention of the Shawmut group that the intention of the above deeds to convey gas was the same by stating:

17. *Id.* at 267, 161 A.2d at 394.
18. *Id.* at 267, 161 A.2d at 394.
19. *Id.* at 277, 161 A.2d at 399.
20. *Id.* at 278, 161 A.2d at 399.
21. *Id.* at 278, 161 A.2d at 399.

> Four minerals—coal, fire clay, limestone, and iron-ore—are specifically mentioned in the *Byrne* deed; two minerals—coal and coal oil—are specifically mentioned in the *Hall-Kaul* deed; a study of the language in both deeds indicates a high degree of selectivity and precision of language and description to have been employed by Arnold, especially bearing in mind that he had but recently been *expressly* given the rights to the natural gas. Arnold's omission of natural gas, coupled with the variation in the delineation of the minerals expressly conveyed to Byrne and Hall-Kaul indicate that Arnold did *not* intend to convey all the mineral rights he had received from Richey et al.[22]

These factors, along with the application of the rule of *ejusdem generis,* motivated the court to conclude that the *Dunham Rule* was controlling and "*that,* [although] *the word 'minerals' appears in a grant, rather than in an exception or reservation, in nowise alters the rule.*"[23] (Emphasis added.) Thus, the conclusion reached by the court is that the Byrne and Hall-Kaul deeds did not convey title to the natural gas rights and the New Shawmut group, successors in title to Byrne and Hall-Kaul, has no title to such rights.[24]

Query, whether the court was bound to apply the *Dunham Rule.* Previously, as has been mentioned, the rule was applied solely to exceptions and reservations. The court in the *Highland* case, as in the *Preston* case, appears just a bit reluctant to apply the rule. Again, the court stated: "As a rule of property long recognized and relied upon, the *Dunham Rule* binds and controls this situation . . . ."[25] The majority in nowise recognizes any distinction between an exception or reservation and a grant. In other words, the only facet of the rule with which the court was concerned was that natural gas should not be construed to be a mineral; it did not matter that the rule, as originally adopted, applied only to reservations and exceptions. It is not contended that the court should have made such a distinction; it is only suggested that perhaps the court was not bound to follow the *Dunham Rule* as one might gather from a reading of the opinion.

The court, in the *Dunham* case, concluded that to include natural gas within the term "minerals" would be to include all inorganic substances within the term, thus making the deed void for repugnancy in that it would be as extensive as the grant.[26] But where only a grant, rather than an exception or reservation, is involved, as in the *Highland* case, would it necessarily follow that to include natural gas within the term "minerals" would void the deed? Thus, it would appear that this may be a situation where the expres-

22. *Id.* at 279, 161 A.2d at 400.
23. *Id.* at 277, 161 A.2d at 399.
24. *Id.* at 280, 161 A.2d at 400.
25. *Id.* at 276, 161 A.2d at 398.
26. Dunham v. Kirkpatrick, *supra* note 3, at 43.

sion, "When the reason for the rule fails, the rule also fails," might be appropriately applied.

It is submitted that a rule of construction, such as the *Dunham Rule,* has two basic purposes. One is that it governs the effect of an ascertained intention or points out what a court should do in the absence of express or implied intention; the other is that it serves to augment a decision based extensively on a desirable policy. There is no doubt that the court was seeking to determine the intention of the parties in the *Highland* case but it is equally evident that there was an underlying "desirable policy" which the court sought to satisfy. Since the *Dunham Rule* now applies to exceptions, reservations, and *grants,* there is more uniformity in the construction and preparation of deeds involving a transfer of mineral rights. That such deeds involving grants were heretofore drafted in accordance with the rule is at least questionable in that no such cases were ever litigated. Rather, it would seem that earlier deeds were drafted pursuant to the original scope of the *Dunham Rule, viz.,* reservations and exceptions.

A rule of construction usually applied to deeds involving ambiguities, and one which the court might have applied in the *Highland* case, is the rule that such ambiguities should be construed most strongly against the grantor.[27] If this latter rule of construction had been applied in the *Highland* case, the court could have reached a contrary result. Under this rule, the meaning of the word "minerals" would have been construed most strongly against the grantor, Arnold, and the court could have found that the natural gas rights were conveyed by the grant.

Other jurisdictions seem to have a varied opinion on the validity of the *Dunham Rule.* The Ohio Supreme Court, in line with Pennsylvania, has stated that, where the grantor provided for the dispersement of ". . . all the coal of every variety and all the iron ore, fire clay and other valuable minerals . . . ,"[28] there was nothing to show that oil was intended to pass, for if it had been, apt words would have been used to show such intent.[29] The Supreme Court of Kentucky, in a case involving a lease or sale of "all mineral rights in the land," made reference to the Pennsylvania and Ohio decisions, and was of the opinion that the grantees did not gain title to the natural gas rights.[30]

On the other hand, the Supreme Court of Tennessee takes issue with the basic principles upon which the *Dunham Rule* exists by stating:

> The great weight of authority is not only opposed to that case, [*Dunham* case] but it seems to us to proceed upon false principles.

27. Klaer v. Ridgway, 86 Pa. 529, 534 (1878).
28. Detlor et al. v. Holland, 52 Ohio 492, 494, 49 N.E. 690, 691 (1898).
29. *Id.* at 504, 49 N.E. at 693.
30. McKinney's Heirs v. Central Kentucky Natural Gas Co., 134 Ky. 239, —, 120 S.W. 314, 317 (1909).

> The ground of the decision . . . is that by the bulk of mankind nothing is considered as mineral except such things as be of metallic nature . . . . We think, however, that the true meaning of the word "mineral" as well as its meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word "mineral" applied only to metals.[31]

A dictionary definition of the word "mineral" appears to, at least in part, substantiate the court's opinion. It is defined as "any inorganic chemical substance existing naturally."[32] "Inorganic chemical substance" would seem to include natural gas and oil. This appears to have been adopted in an early Michigan case when it was argued that, "the use of the words 'all minerals' is not sufficient in a reservation to include petroleum oil, or gas," the court took the position that "as far as our examination goes this case [*Dunham v. Kirkpatrick*] stands alone."[33]

Another jurisdiction even goes further and takes the position that, unless the term "minerals" is in some way qualified or restricted in the deed, it is presumed that both natural gas and oil were intended to be included within such term.[34] The reasoning is based upon the premise that, "Legally and scientifically, oil and gas are universally held to be minerals. At the present time they are popularly so considered."[35] Thus, a basic point of departure by the courts is the criteria to be used to determine whether the word "minerals" is, or is not, *popularly* understood to include or preclude natural gas and oil. An examination of some Pennsylvania cases discloses that the courts still hold that natural gas and oil are minerals for many purposes.[36] However, a West Virginia court has suggested why these decisions are not necessarily inconsistent with those decisions espousing the *Dunham Rule*:

> [T]hese decisions do not necessarily conflict with that of Dunham v. Kirkpatrick, for they declare that, in a legal sense, oil and gas are minerals, while the other cases declare that, as tested by the intention of the parties to a deed, disclosed by the terms used therein, viewed in the light of the popular meaning of the term, a mere matter of contract, they are not minerals. The determination of the question by that standard seems to us inevitably to produce a contrary result.[37]

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31. Murray v. Allard, 100 Tenn. 100, —, 43 S.W. 355, 359 (1897).
32. WEBSTER, NEW AMERICAN DICTIONARY (1955).
33. Weaver v. Richards, 156 Mich. 320, —, 120 N.W. 818, 819 (1909).
34. Sult v. Hochstetter Oil Co., 63 W. Va. 317, —, 61 S.E. 307, 311 (1908).
35. *Id.* at —, 61 S.E. at 311.
36. Stoughton's Appeal, 88 Pa. 198 (1879); Funk v. Haldeman, 53 Pa. 229 (1867); Gill v. Weston, 110 Pa. 312, 1 Atl. 921 (1885); Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564 (1896); Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201 (1897).
37. Sult v. Hochstetter Oil Co., 63 W. Va. 317, —, 61 S.E. 307, 311 (1908).

Regardless of the soundness of the rule, Pennsylvania conveyancers will have to take cognizance of it in situations where it may be applied. In conclusion, it would seem in Pennsylvania, that whenever the attorney is confronted with a conveyance involving the transfer or retention of natural gas and oil along with other mineral rights, he should *specifically enumerate* in the deed that gas and oil are elements to be either transferred or retained. Although the surrounding circumstances may serve to indicate who has the right, title, and interest in the gas and oil, a specific enumeration thereof tends to remove any doubt. In addition, it would appear to be advisable for the attorney when conveying other than absolute title, such as a license or a leasehold, to specifically enumerate the elements of natural gas and oil. This would remove any ambiguities from an extension of the *Dunham Rule* to any and all transfers of mineral rights in land.

BERNERD A. BUZGON

# THE ABOLITION OF THE YEAR AND A DAY RULE: COMMONWEALTH V. LADD

In the recent case of *Commonwealth v. Ladd*,[1] the Supreme Court of Pennsylvania sustained a murder indictment where death had occurred more than a year and a day after the alleged fatal blow, and thus abolished the common law "year and a day" rule. Prior to this decision, the rule had been that if more than a year and a day intervened between the injury and the death of the victim, the injury was not legally deemed the cause of death. Consequently, the person who inflicted the injury would not be criminally responsible for the homicide.[2]

In banishing the rule, the court first determined that it was evidentiary in nature, and then stated that "we may change a common law rule of evidence without being guilty of judicial legislation, and abolish it when we are aware that modern conditions have moved beyond it and left it sterile."[3] Before analyzing this reasoning, attention must be drawn to the enactments of the Pennsylvania General Assembly. The "year and a day" rule has not been codified; also, murder has not been defined but merely divided into degrees with penalty provisions added.[4] The courts of this Commonwealth have construed this absence of statutory definition to mean that the legislature intended to give murder its common law meaning.[5] If the "year and a day" rule is considered an element of murder, any statement as to its status must stem from the common law. Pennsylvania, of course, has its own common law, but the legislature also specifically adopted the prior laws and acts of Pennsylvania's pre-revolutionary provincial government and the statutory and common law of England.[6] As a result, the definition of murder and the "year and a day" rule, as found within the realm of the English common law, were adopted into Pennsylvania law.

In the *Ladd* case then, because of Pennsylvania's "common law" murder, the court was squarely faced with the question of whether it could properly abolish the "year and a day" rule without being guilty of judicial legislation. The majority felt free to abolish the rule if it was *not substantive or part of the definition of murder*.[7] The determination of what does or does not constitute an invasion of legislative power apparently flowed from *Commonwealth v. Redline* where the court said: "The only constitutional power com-

1. Commonwealth v. Ladd, Nos. 165, 166, Sup. Ct. Pa., Dec. 1. 1960.
2. 40 C.J.S., *Homicide* § 12 (1944).
3. Commonwealth v. Ladd, *supra* note 1, majority opinion at 10.
4. 15 PA. STATS. 1794, ch. 1177 § 2; PA. STATS., 1860, Act. No. 374 § 74; PA. STAT. ANN. tit. 18, § 4701 (1939).
5. Commonwealth v. Exler, 243 Pa. 155, 89 Atl. 968 (1914); Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); White v. Commonwealth, 6 Binn. 179 (Pa. 1813). See also, 17 P.L.E., *Homicide* § 14 (1959); 40 C.J.S., *Homicide* § 13 (1944).
6. PA. STAT. ANN. tit. 46, § 152 (1777).
7. Commonwealth v. Ladd, *supra* note 1, majority opinion at 4.

petent *to define crimes* and prescribe punishments therefor is the legislature and the courts do well to leave the promulgation of police regulations to the people's chosen legislative representatives."[8] (Emphasis added.) Thus being required to uncover the nature of the rule, resort to the common law was necessary.

The first mention found of the year and a day term in the English common law is in the *Statute of Glouchester* enacted in 1278.[9] This statute allowed a year and a day from the time of the injury for a private appeal of murder to be initiated.[10] Viewed in the light of the first statute, the rule appears to be in the form of a statute of limitations because it dealt with the period within which an action might be initiated. However, later commentators used this statute as authority for holding it was a rule of evidence since the period was to run from the date of the "stroke" rather than from the time of death. Subsequently, there followed a period of confusion as to whether the time was to run from the day of the blow or from the time of death. This was probably due to the fact that the *Statute of Glouchester* stated the time was to run from the blow. It should be kept in mind though, that the purpose of the statute was to limit the time of bringing the appeal, which more logically should seem to run from the date of death. The confusion is pointed up by *Heydon's Case,*[11] a murder trial heard during the latter part of the sixteenth century in which the court ruled the time was to run from the day of the death. This case has been held to be the principal authority for concluding the "year and a day" rule is by nature a limitation.

As the rule developed, the controversy revolved between viewing the year and a day rule as *substantive* or *evidentiary;* the *procedural view* having been almost completely discarded. This difference of opinion has continued to the present day in the case law and among the various authorities —the sides being almost equally divided.[12]

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8. 391 Pa. 486, 490, 137 A.2d 472, 473 (1959).

9. Statute of Glouchester, 1278, 6 Edw. 1, c. 9, This statute provided:

An Appeal for Murther

The King Commandeth that no Write fhall be granted out of the Chancery for the death of a Man to enquire whether a Man did kill another by Misfortune, or in his own Defence, or in other Manner without Felony; (2) be he fhall be put in Prison until the coming of the Justices in Eyre, or Juftices affigned to the Goal-delivery, and fhall put himself upon the Evil; (3) In cafe it be found by the Country, that he did it in his Defence, or by Misfortune then by the Report of the Juftices to the King, the King fhall take him to his Grace, if it pleafe him. (4) It is provided alfo, that no Appeal fhall be abated to foon as they have been heretofore; but if the Appellor declare the Deed was done and with that Weapon he was fain, the Appeal shall ftand in effect. (5) and fhall not be abated for Default or frefh Suit, if the Party fhall fue within the Year and the Day after the Deed done.

10. See Commonwealth v. Ladd, *supra* note 1, majority opinion at 2 for an explanation of early common law murder appeals.

11. 4 Coke's Reports 41, 76 Eng. Rep. 631 (1558).

12. See Commonwealth v. Ladd, *supra* note 1. In addition, see People v. Murphy, 39 Cal. 52 (1870); State v. Sides, 64 Mo. 383 (1877); The People v. Wallace, 9 Cal.

The majority in the present case stated that the rule was a *rule of evidence* without setting forth reasons for such a conclusion. Regardless of the exact nature of the rule, it was undoubtedly a cogent factor in the prosecution of murder. It would seem to require, therefore, a precise and detailed explanation when used as a basis for abolishing the rule.

The concurring justice stated: "From my examination of the authorities I am convinced that the year and a day rule was, at common law, part and parcel—and an absolutely essential indispensable part and parcel—of the *substantive* law of murder."[13] Thus, the concurring opinion amplifies the above mentioned conclusion as to the exact nature of the rule.

The justice then went on to concur in the majority's conclusion for the reason that the "year and a day" rule, although found in the *substantive* law of England, was never part of the common law of Pennsylvania. This being so, he deduced that the court could then justifiably refuse to apply the rule in the present case. Would it not seem though, that since the Act of 1777[14] specifically adopted the common law of England as the common law of Pennsylvania without excepting the "year and a day" rule from its coverage, that the rule must have become part of the law of Pennsylvania?

The position assumed by the majority—that the rule may also be extinguished because it is excluded from the definition of murder—seems somewhat questionable, considering the judicial determination at hand. Initially, it should be pointed out that an inherent problem exists in the formulation of the definition of a common law crime. Is not a definition merely a crude attempt to formulate the "highlights" of a particular cause of action? It would seem to be by no means all inclusive. The problem of complete definition is pointed up by Bishop, one of the most analytical of our writers on the criminal law.[15] In his work he first presents and criticizes the definition of murder formulated by Hawkins, and in a note, reproduces those framed by Coke and Mansfield. Bishop then ventures upon one of his own and concludes by saying that a definition of murder "in all respects neat, complete, and exact is in the nature of the subject impossible."[16]

Also intimated in the majority opinion was that no authority could be uncovered where the year and a day rule was included within the definition of murder. In this regard, Sir Edward Coke, writing in 1628, defined the offense of murder as follows:

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31 (1858); Commonwealth v. Parker, 2 Pick. 550 (Mass. 1824); State v. Mayfield, 66 Mo. 125 (1877); Rex v. Dyson, 2 K.B. 454, 171 Eng. Rep. 461 (1908); 2 BISHOP, CRIMINAL LAW 483 (9th ed. 1923); HARRIS & WILSHERE, CRIMINAL LAW 187 (15th ed. 1933); Annot., 20 A.L.R. 1006 (1922); Annot., 93 A.L.R. 1470 (1934); 10 WISC. L. REV. 112 (1934); 15 TUL. L. REV. 306 (1940); 19 MINN. L. REV. 240 (1935).

13. Commonwealth v. Ladd, *supra* note 1, concurring opinion at 1.
14. PA. STAT. ANN. tit. 46, § 152 (1777).
15. 2 BISHOP, CRIMINAL LAW, §§ 732-735 (9th ed. 1923).
16. *Id.* at § 735.

> Murder is when a man of found memory, and of the age of difcretion, unlawfully killeth within any country of the realm any reafonable creature in rerum natura under the King's peace, with malace fore-thought, either expreffed by the party, or implied by the law, fo as the party wounded, or hurt, &c. die of the wound or hurt, &c. *within a year and a day after the fame.*[17] [Emphasis added.]

Hawkins, writing in 1716, included the rule within his definition of murder[18] as did Warren in essence.[19]

When a court is abolishing a rule of law, it is submitted that the proper exercise of judicial power should be explained and supported by broad policies concerning the criminal law rather than narrow determinations resting on very technical bases. The aim and purpose of the criminal law is to provide adequate protection for society and simultaneously assure justice for the individual accused. A balance between the two requires a determination which necessarily varies with the environment and background of the particular individual making the inquiry. For this reason it seems that alteration or modification of the criminal law (other than a mere procedural rule) should be made by the legislature where a more representative determination may be made.

Justice Musmanno, commenting in a strong dissent, criticized the majority's exercise of power. He considered the existence and application of the rule so well established that abolition of the rule by the judiciary necessitated invasion of the exclusive province of the legislature. Thus, the basis of this argument was *stare decisis.* Such a rationale undoubtedly has merit, especially in the light of one of the aims of the criminal law—certainty and predictibility. However, the emphasis to be placed on such an argument would seem to fade when opposed by the threat from a crime involving serious moral turpitude.

Constitutional considerations also appeared in the court's path when abolishing the rule. In this regard the pertinent provision of the Pennsylvania constitution is article 1, section 9, titled "Rights of Accused in Criminal Prosecutions" which provides: ". . . he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by judgment of his peers or *the law of the land.*" (Emphasis added.) The *"law of the land"* has been construed to mean *due process of law.*[20] This is a somewhat nebulous term used to describe the constitutional guarantee of basic fairness in acts by the sovereign in dealing with individual citizens.

17. COKE, 3 INST. 47 (1797).

18. 1 HAWKINS, HISTORY OF THE PLEAS OF THE CROWN 78 (8th ed. 1824).

19. See 1 WARREN, HOMICIDE 185 (perm. ed. 1938) where the author includes the "year and a day" rule within the definition of homicide.

20. Banning v. Taylor, 24 Pa. 289 (1955); Menges v. Dentler, 33 Pa. 495 (1859).

The majority did not directly dispose of this question. However, they did note at one point that "we are not dealing with any of the basic and living rights of the defendant, like the right to confront his accuser, the right to be presumed innocent, or the right to due process of law."[21]

The only query raised which might infringe on constitutional due process would be the retroactive effect of abolition of the "year and a day" rule at a time after the alleged assault was committed. However, banishment of the rule does not deprive the defendant of any fundamental right. In theory the court is construing the rule's application in the light of conditions and circumstances which existed at the time of the injury and not when the appeal is taken. In addition, it does not offend one's sense of justice that abolition of the rule takes place after the commission of the crime since murder involves serious moral turpitude and it is only a chance happening that the victim lives longer than a year and a day after the assault. Moreover, it is not as if the burden is removed from the prosecution to prove that death flowed from the wrongful act of the defendant. When viewed in this light, there appears to be no constitutional violation involved.

In overruling the "year and a day" rule, the majority seemed impelled by the fact that the rule's basis is presently anachronistic. The reason for the "year and a day" rule was stated by Coke to be that, "If he died after that time [year and a day] it cannot be discerned, as the law presumes whether he died of the stroke or poison, etc., or a natural death; and in the case of life, the law ought to be certain."[22] Thus, Coke's interpretation of the reason for the rule appears to be that it was an arbitrary settlement of what may have originally been a very difficult question of proof of physical cause. The difficulty of proof arose because: First, in the early English courts the jury found the verdict upon their own knowledge, or expressed the community conviction on the question;[23] Secondly, medical technology simply had not developed to the point where death could be determined to have resulted from a particular cause.

However, today both of these reasons for the difficulty of proof have been somewhat abrogated. The jury may now rely on the testimony of expert witnesses and need not decide the question on the basis of their own individual knowledge. Many courts and commentators have noted the advances made in medical science.[24] The majority in the *Ladd* case took judicial notice of this and also the improvements made in scientific crime detection.[25]

21. Commonwealth v. Ladd, *supra* note 1, majority opinion at 8. Appellant also raised the fourteenth amendment of the United States Constitution.

22. COKE, 3 INST. 52 (1797).

23. THAYER, EVIDENCE 174 (1898).

24. People v. Legeri, 239 App. Div. 47, 48, 266 N.Y.S. 86, 88 (1933); SPECIAL REPORT FROM THE SELECT COMMITTEE ON HOMICIDE LAW AMENDMENT BILL, ETC., MINUTES OF EVIDENCE, ETC. 7, 68 (English 1874).

25. Commonwealth v. Ladd, *supra* note 1, majority opinion at 8.

Consequently, a period of a year and a day after which death is conclusively presumed to result from natural causes is no longer realistic.

Though being inadequate in the light of modern medical advances the rule did serve a need for some form of limitation to "cut-off" causation. This need may be pointed up by a brief comparison of causation in civil survival and wrongful death actions, and criminal felonious homicide cases.

In criminal cases there must usually be an unbroken chain of events between the defendant's act and the decedent's death. To establish such a chain, two factors must be satisfied. First, the defendant's act must be a contributing cause leading to the death, and second, there must be no independent intervening agencies. The *sine qua non* or "but for" test is applied to assure that defendant's act was a contributing factor. If an agency has intervened between the defendant's act and the death, the foreseeability test from the benefit of hindsight is used to determine if there is an independent intervening agency. If the agency was foreseeable, it would not constitute an independent intervening agency so as to relieve the defendant from responsibility.[26]

In the civil wrongful death or survival actions resulting from an intentional tort perpetrated by the defendant, the factors constituting causation are much the same. However, in addition, there is an indirect limitation on causation, that being, the statute of limitations for maintaining the wrongful death[27] and survival actions,[28] which are one and two years respectively.

Thus, in civil actions, the statute of limitations has the effect of severing causation at a maximum of two years.[29] There is no statute of limitations on indictment for felonies homicide, nor would the adoption of one be practical. However, in the absence of some sort of limitation on the causal relationship, one might, as the result of a childhood fracas, conceivably be convicted many years later of some form of felonious homicide. The "year and a day" rule served to negate such a result in murder and manslaughter.

Complete abolition of the rule clearly recognizes the advances in medical technology, but also creates a need for some form of limitation on causation. Should the legislature decide to act in this area there are at least two solutions which seem to serve both requirements. First, the legislature might possibly expand the time of limitation from a year and a day to a period within which medical experts might reasonably determine that the death flowed from the wrongful assault of the accused. For example, the period

26. Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955).

27. PA. STAT. ANN. tit. 12 § 34 (1895).

28. PA. STAT. ANN. tit. 12 § 1603 (1855).

29. In some cases of the continuing trespass type a cause of action may be maintained in excess of two years after the original wrongful act. However, the analogy being drawn is to the assault cases where no continuing trespass is involved.

of a "year and a day" might be extended to five or ten years, or to that point in time wherein it becomes difficult for medical science to determine whether the death flowed from the assault or from natural or other causes. This solution would, however, entail speculation in determining the point after which causation based on medical technology becomes indefinite and unsure. In addition, the "cut-off" point is arbitrary which was one of the major criticisms of the "year and a day" rule expressed by the court in the *Ladd* case.

A second, and more realistic approach, which would better serve the aims of society and protect the rights of the accused, would be for the legislature to enact a statute establishing a period after which there would be a rebuttable presumption that the accused did not cause the death of the decedent. The result would be to place the adjudication of felonious homicide causation solely within the province of the jury as a finding of fact. This solution then, would have all the usual protections provided by jury trial, and would also take into consideration medical advances without being arbitrary in nature.[30] In this manner the void, created by the instant case, could be filled to better serve the ends of Justice, which prompted abolition of the "year and a day" rule.

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30. However, query whether the adoption of a rebuttable presumption that death, after a certain period, resulted from natural causes would place an additional burden of proof on the prosecution in light of the existing presumption of innocence. In theory, it seems the state would face no greater obstacle. In practice, the legislative and judicial recognition of such a rebuttable presumption would serve to accentuate to the trier-of-fact that the defendant's act must have at least been a contributing cause of the decedent's death. In this manner, a proper finding of causal relationship would tend to be insured as the informed jury would be fully aware that after a long period death from natural causes is the likely alternative.